(2)

No. 01-1215

Supreme Court, U.S.
FILED
FEB 28 2002

In The

Supreme Court of the United States

BRIAN BURGESON, JOHN DORNER, BRIAN FOSTER, MAURY GANTMAN, RAYMOND GREVE, KELLY JACKSON, RICHARD KIM, LAURA LOKEN, MOIRA WEYRICH, JOSE MENDEZ, TIMOTHY McPHILLIPS, EDWARD PICKELL, EDWARD PLUCINSKI, MAURICE SMITH, JEFFREY SULKIN, GEORGE VELISARIS, MIKE WISH and MICHELLE ZIMMERMAN, in their individual capacities,

Petitioners,

v.

MARCELLA RICHMAN, individually and as Special Administrator of the Estate of JACK B. RICHMAN, deceased,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ALVIN W. BLOCK
EDWARD A. COHEN
JEROME E. BOYLE*
**Counsel of Record*
BLOCK & ASSOCIATES
33 N. LaSalle Street, Suite 3000
Chicago, Illinois 60602
(312) 346-5656
Counsel for Respondent

Of Counsel
SHELDON H. NAHMOD
565 W. Adams Street
Chicago, Illinois 60661
(312) 906-5261

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

27 pp

QUESTION PRESENTED

Should not this Court deny certiorari where: (1) a circuit court has ruled that law enforcement officers who exceed the scope of a judge's order to restrain a person, and use excessive force in violation of the Fourth Amendment, are protected only by qualified immunity from section 1983 damages liability, not absolute immunity; (2) only one other circuit court has thus far directly ruled on the question, although to the contrary; (3) the challenged circuit court decision does not conflict with any decisions of this Court; and (4) the circuit court got it right because the officers' conduct is executive in nature and not judicial, absolute quasi-judicial immunity is inconsistent with the 1871 common law of torts, and the relevant policy considerations do not support absolute immunity?

TABLE OF CONTENTS

Page

STATEMENT OF THE CASE 1

A. FACTS 1

B. PROCEEDINGS BELOW 2

SUMMARY OF ARGUMENT 5

REASONS FOR DENYING THE WRIT 8

I. INSUFFICIENT CONSIDERATION HAS BEEN GIVEN BY THE CIRCUITS TO THE NARROW ISSUE PRESENTED IN THIS CASE; THUS, IT WOULD BE PREMATURE TO GRANT THE PETITION 8

II. THE SEVENTH CIRCUIT'S DECISION DOES NOT CONFLICT WITH *MIRELES V. WACO* BECAUSE THE CHALLENGED CONDUCT OF PETITIONERS IS NOT JUDICIAL IN NATURE 11

III. THE SEVENTH CIRCUIT CORRECTLY RULED THAT THE PETITIONER DEPUTY SHERIFFS ARE NOT PROTECTED BY ABSOLUTE QUASI-JUDICIAL IMMUNITY 14

A. The Petitioners' Challenged Conduct is Executive in Nature 15

B. The Common Law Immunity Background Does Not Support a Quasi-Judicial Immunity Rule ... 16

C. Relevant Policy Considerations Support Only a Qualified Immunity Rule in Cases Like This ... 19

CONCLUSION 22

TABLE OF AUTHORITIES

Page

CASES

Antoine v. Byers & Anderson, 508 U.S. 429 (1993) 16, 17, 21

Burns v. Reed, 500 U.S. 478 (1991) 7, 15, 17

Butz v. Economou, 438 U.S. 478 (1978) 17

Carey v. Piphus, 435 U.S. 247 (1978) 21

Conley v. Gibson, 355 U.S. 41 (1957) 1

Forrester v. White, 484 U.S. 219 (1988) 7, 13, 15, 16

Forrester v. White, 792 F.2d 647 (7th Cir. 1986), *rev'd*, 484 U.S. 219 (1988) 16

Graham v. Connor, 490 U.S. 386 (1989) 16

Gregory v. Thompson, 500 F.2d 59 (9th Cir. 1974) 13

Harlow v. Fitzgerald, 457 U.S. 800 (1982) 14, 20

Malley v. Briggs, 475 U.S. 335 (1986) 16

Martin v. Board of County Commissioners, 909 F.2d 402 (10th Cir. 1990) 3, 6, 9, 10

Martin v. Hendren, 127 F.3d 720 (8th Cir. 1997) ..... *passim*

Mireles v. Waco, 502 U.S. 9 (1991) ..... *passim*

Pierson v. Ray, 386 U.S. 547 (1967) 14, 16

Richman v. Sheahan, No. 98 C 7350, 2000 U.S. Dist. LEXIS 5861 (N.D. Ill. March 31, 2000), *aff'd in part, rev'd in part*, 270 F.3d 430 (7th Cir. 2001) 3, 4, 5, 10

TABLE OF AUTHORITIES – Continued

Page

Robinson v. Freeze, 15 F.3d 107 (8th Cir. 1994)..... 9

Scheuer v. Rhodes, 416 U.S. 232 (1974) 20

Stump v. Sparkman, 435 U.S. 349 (1978)..... 12

Tenney v. Brandhove 341 U.S. 367 (1951)..... 7

Valdez v. City of Denver, 878 F.2d 1285 (10th Cir. 1989).....6, 9, 11, 20

STATUTES AND RULES

42 U.S.C. § 1983..... *passim*

Prison Litigation Reform Act, Pub. L. No. 104-134, 1996 HR 3019 21

United States Supreme Court Rule 15.2 1

Circuit Rules of the United States Court of Appeals for the Seventh Circuit, Rule 40(e) 5

55 ILCS 5/3-6015..... 19

55 ILCS 5/3-6016..... 19

55 ILCS 5/3-6021..... 19

55 ILCS 5/3-6023..... 3

OTHER AUTHORITIES

F. Mechem, *The Law of Public Offices and Officers* (1890).....17, 19

T. Cooley, *Law of Torts* (1880) 17, 18

STATEMENT OF THE CASE

A. FACTS[1]

Jack Richman went to the Circuit Court of Cook County, Illinois, to testify on a traffic ticket for his mother, Respondent Marcella Richman. Amended Complaint (AC) ¶¶5, 10. Jack walked into the courthouse with a cane, because he was disabled. AC¶18. But he was carried out of the courthouse on a stretcher, because he was dying. AC¶27. The Petitioners, fourteen deputy sheriffs, saw to that. AC¶¶15, 16.

Two of these deputy sheriffs were actually in the courtroom when the presiding judge told them to restrain Jack because of Jack's refusal to stop talking. AC¶15. But the other twelve never heard the judge's directive, because they came into the courtroom, and pounced on Jack, only *after* the judge issued his command. AC¶16. Although Jack did not, and could not, resist the restraint, the deputy sheriffs used excessive force against him: they forced him to the floor, face down, they sat on him, and they pulled his arms behind his back to handcuff him. AC¶¶17, 18, 20, 22-3. Jack gasped for air, and complained of pain and an inability to breathe. AC¶19. Finally, one or

---

[1] Like the District Court, and the Court of Appeals, Richman bases her recitation of the facts solely on the allegations of her amended complaint which, for purposes of a motion to dismiss, are taken as true. *Conley v. Gibson*, 355 U.S. 41 (1957). Unlike the Petitioners, Richman does not rely improperly on a superseded pleading to embellish her factual discussion. Pursuant to this Court's Rule 15.2, Richman objects to the Petitioners' reference to facts *dehors* the amended complaint.

more of the deputy sheriffs noticed that Jack's face and lips were blue, that he appeared to have stopped breathing, and that he had emptied his bladder and bowels. AC¶21. Paramedics were called and, upon arrival, they administered CPR, and took him to a hospital, where he was pronounced dead. AC¶27.

Marcella watched the attack on her son from the sidelines. AC¶19. Although she too was disabled, and could not resist, four other deputy sheriffs restrained her, and then removed her from the courtroom. AC¶¶19-21. In all, eighteen deputy sheriffs restrained this elderly, disabled woman and her disabled son. AC¶¶16, 19.

B. PROCEEDINGS BELOW

Count I of Marcella Richman's amended complaint seeks damages from the fourteen deputy sheriffs, the Petitioners, in their individual capacities, pursuant to 42 U.S.C. § 1983, for their killing of Jack Richman, which violated his rights under the Fourth and Fourteenth Amendments.[2] The fourteen deputy sheriffs moved to dismiss this claim, contending that their actions were protected by the absolute immunity afforded to judges. *Cf. Mireles v. Waco*, 502 U.S. 9 (1991) (judge who ordered police officers to seize lawyer with "excessive force" absolutely immune.)

---

[2] Marcella Richman brings this claim on behalf of her son's estate. She also asserts other claims, both individually and on behalf of her son's estate, which are not relevant to the pending petition.

Although, in contrast to the instant case, *Mireles* involved an explicit command from a judge to use "excessive force" (502 U.S. at 10), the deputy sheriffs here nevertheless analogized their behavior to that of the police officers in *Mireles*. The deputy sheriffs here argued that they have a duty, established by Illinois statute, to obey all "lawful orders and directions of the court" (55 ILCS 5/3-6023), and that this duty absolved them of any responsibility for the *manner* in which they carried out the judge's directive.

The District Court disagreed, and denied their motion. *Richman v. Sheahan*, No. 98 C 7350, 2000 U.S. Dist. LEXIS 5861 (N.D. Ill. March 31, 2000), *aff'd in part, rev'd in part*, 270 F.3d 430 (7th Cir. 2001). In so doing, the court noted the contrast between the Tenth Circuit's holding in *Martin v. Board of County Commissioners*, 909 F.2d 402 (10th Cir. 1990), where a challenge to the *manner* in which officers carried out a judge's order was not barred by absolute immunity, and *Martin v. Hendren*, 127 F.3d 720 (8th Cir. 1997), where it was. 2000 U.S. Dist. LEXIS 5861 at 6-10. According to the District Court, the Tenth Circuit's approach was the better one, since it recognized a "common-sensical standard" whereby immunity protects officers from the fact of their enforcement of an order, but does not protect them from their use of excessive force not prescribed by the order. *Id.* at 7-8. According to the District Court:

> Under the Eighth Circuit's reasoning, if a judge told deputies to subdue a loud-mouthed litigant in her courtroom, a deputy who did so with lethal force would be absolutely immune. For this reason, the court believes the Tenth Circuit rule is the better one. *Id.* at 9.

The Seventh Circuit Court of Appeals affirmed. *Richman v. Sheahan*, 270 F.3d 430 (7th Cir. 2001). According to that court:

> The policies articulated by our quasi-judicial immunity cases have less force when, as in this case, the challenged conduct is the manner in which the judge's order is carried out, and not conduct specifically directed by a judge. *Reading Richman's complaint in the light most favorable to her, the claim is not that the judge ordered the deputies to use unreasonable force, but that the deputies exceeded the judge's order by the manner in which they executed it.* The claim for damages in this case is not therefore a collateral attack on the judge's order (an order that Richman concedes was valid), and an appeal of the judge's order would provide no remedy. Similarly, *the deputies are not being called upon to answer for wrongdoing directed by the judge, but instead for their own conduct.* And that conduct – the manner in which they enforced the judge's order – implicates an executive, not judicial, function. 270 F.3d at 437-8 (emphasis supplied).

The Seventh Circuit went on to stress the importance of this functional approach, and to square this approach with the policy of immunity.

> A secure courtroom is necessary to protect the judicial function from interference or intimidation; this function is adequately protected by immunizing a judge's order to restrain a person *see Mireles*, 502 U.S. at 12-13, 112 S.Ct. 286, and by barring lawsuits that challenge a judge's decision through claims aimed at officers who do nothing more than implement it. *See Henry*,

> 806 F.2d at 1238-39. It is not necessary to the judicial function, in our judgment, to also deny a remedy to plaintiffs who were harmed not by the judge's order, but by unlawful conduct by those who enforce it. We therefore affirm the district court's denial of the deputies' motion to dismiss the plaintiff's § 1983 claims. 270 F.3d at 438-9.

The Seventh Circuit's decision was, pursuant to its Rule 40(e), circulated to the full Court of Appeals. A majority of the full court did not favor rehearing en banc, although one judge, who also dissented from the panel's decision, voted to grant rehearing. 270 F.3d at 439, 443.

SUMMARY OF ARGUMENT

This case does *not*, contrary to Petitioners' mischaracterization, involve a section 1983 challenge, direct or indirect, to the validity of a judge's order and it does *not* involve a judge's immediate direction and supervision. Rather, it more narrowly deals with the scope of immunity of the Petitioner deputy sheriffs who, when instructed by a state court judge to restrain Respondent's son, exceeded the scope of the judge's order, used excessive force in violation of the Fourth Amendment and thereby caused the death of Respondent's son. On this issue the Seventh Circuit ruled that Petitioners are not protected by absolute quasi-judicial immunity from section 1983 damages liability.

This Court should deny the Petition for several reasons. First, it would be premature at this time to hear this case because only three circuits, the Seventh, Eighth and

Tenth Circuits, have thus far considered the issue, and only the holdings of the Seventh and Eighth Circuits directly conflict. The Eighth Circuit's decision in *Martin v. Hendren*, 127 F.3d 720 (8th Cir. 1997), which found absolute quasi-judicial immunity applicable, was, furthermore, accompanied by a powerful dissent. The Tenth Circuit's decision in *Valdez v. City of Denver*, 878 F.3d 1285 (10th Cir. 1989), which found quasi-judicial immunity applicable to law enforcement courtroom conduct prescribed by court order, was subsequently expressly distinguished by the Tenth Circuit itself as not governing those cases in which law enforcement officers exceeded the scope of a judge's order and violated a person's constitutional rights. *Martin v. Board of County Commissioners*, 909 F.2d 402 (10th Cir. 1990). Finally, in this case the Seventh Circuit analyzed these Eighth and Tenth Circuit decisions and concluded, over a dissent which followed the unsound reasoning of the Eighth Circuit in *Hendren*, that absolute quasi-judicial immunity was not applicable.

Three circuit decisions, with none of them en banc, with only two of them strictly on point, and with dissents in both, do not warrant the grant of certiorari. The issue should be allowed to percolate in other circuits and receive further analysis before this Court expends its scarce resources and decides to resolve any conflict.

A second reason for denying the Petition is that, contrary to the Petitioners' contention, the Seventh Circuit's decision does not in any way conflict with this Court's judicial immunity decision in *Mireles v. Waco*, 502 U.S. 9 (1991). *Mireles* dealt with a section 1983 damages action against a judge challenging the constitutionality of

a court order. In marked contrast, *this case does not involve a challenge to the state court judge's order either directly or indirectly*. There is no direct challenge to the judge's order because the judge was not sued by Respondent. There is similarly no indirect challenge because the Petitioners are accused of going beyond the scope of the judge's order in using unconstitutional excessive force against Respondent's son, the decedent.

A third reason for denying the Petition is that the Seventh Circuit got it right. It correctly concluded after careful analysis that absolute quasi-judicial immunity is not applicable to challenged law enforcement conduct that goes beyond the scope of a judge's order. This Court's case law emphasizes a functional approach to immunities and, under that approach, the challenged conduct of the Petitioners is executive in nature and not judicial. *Forrester v. White*, 484 U.S. 219 (1988). Also, absolute quasi-judicial immunity is inconsistent with the common law immunity background of section 1983, *Tenney v. Brandhove*, 341 U.S. 367 (1951), against which section 1983 is to be interpreted: a sheriff was not protected by absolute quasi-judicial immunity for such conduct under the common law extant in 1871 when section 1983 was enacted, and such conduct was not considered judicial in nature under that common law. Finally, the policy considerations ordinarily supporting absolute immunity are insufficient to do so here. *Burns v. Reed*, 500 U.S. 478 (1991).

REASONS FOR DENYING THE WRIT

I. INSUFFICIENT CONSIDERATION HAS BEEN GIVEN BY THE CIRCUITS TO THE NARROW ISSUE PRESENTED IN THIS CASE; THUS, IT WOULD BE PREMATURE TO GRANT THE PETITION.

Petitioners mischaracterize this case as involving bailiffs who were sued for merely following a judge's order to restrain a party. As discussed later – *see* Argument II *infra* – they do so in an obvious attempt to implicate judicial immunity and *Mireles v. Waco*, 502 U.S. 9 (1991). In reality, however, this particular case involves the law enforcement conduct of deputy sheriffs and *not* bailiffs, and these deputy sheriffs did not engage in the conduct prescribed by a court order but exceeded its scope when they used excessive force and thereby violated the seized person's Fourth Amendment rights. As thus correctly described, there is currently an insufficient body of circuit case law dealing with this issue to warrant the grant of certiorari. Rather, the issue calls for further reasoned analysis and consideration by other circuits so that it is fully fleshed out before coming to this Court.

Only three circuits – the Seventh (the present case), Eighth and Tenth – have thus far even discussed the specific issue presented by this case. The Eighth Circuit ruled in *Martin v. Hendren*, 127 F.3d 720 (8th Cir. 1997), that absolute quasi-judicial immunity applied to protect law enforcement officers who enforced a court's restraint order even though the challenged conduct exceeded the scope of the order and, because it constituted excessive force, violated the Fourth Amendment. However, there was a powerful dissent by Judge Lay, *id.* at 722. He

contended that the majority had ignored the crucial distinction between a section 1983 damages action against a law enforcement officer who *legally* enforced a court order, which is in effect a suit directed at the court order itself and thus protected by absolute quasi-judicial immunity, and a section 1983 damages action directed against a law enforcement officer sued for carrying out a court order in an *unlawful* manner.[3]

The Tenth Circuit decision, *Martin v. Board of County Commissioners*, 909 F.3d 402 (10th Cir. 1990), involved a section 1983 damages action against deputy sheriffs alleging that they used excessive force in executing a search warrant. Distinguishing its earlier decision in *Valdez v. City of Denver*, 878 F.2d 1285 (10th Cir. 1989), which Petitioners incorrectly claim is consistent with their position,[4] the Tenth Circuit emphasized that while absolute

---

[3] Judge Lay also maintained that the majority had departed from its own precedent in *Robinson v. Freeze*, 15 F.3d 107 (8th Cir. 1994), and that its reliance on *Mireles* was flatly wrong. In his view, *Mireles* was inapplicable to *Hendren* because it dealt with the absolute immunity of judges, not with those who enforce court orders. He argued, 127 F.3d at 723:

> Under the majority's reasoning, if a judge orders a bailiff to remove a litigant from the courtroom, and the bailiff decides that the most expeditious way to accomplish this order is to bash the litigant in the head with a baseball bat, the bailiff would enjoy absolute immunity. This is not the type of action the doctrine of absolute immunity is designed to protect.

[4] In *Valdez*, the officers were sued for their compliance with a facially valid court order of contempt, and *not* for the manner in which they complied. Thus, it was the *judge's order* that was the target of the plaintiffs in *Valdez*.

quasi-judicial immunity might protect the deputy sheriffs "from liability for the actual arrest, it does not empower them to execute the arrest with excessive force." *Id.* at 404. It reasoned that "a judicial warrant contains an implicit directive that the arrest and subsequent detention be carried out in a lawful manner." *Id.* at 405. But to the extent that the defendants in *Martin* "exceeded legal bounds in executing the warrant for arrest, defendants have *a fortiori* violated the very judicial order under which they seek the shelter of absolute immunity." *Id.* Thus, according to the Tenth Circuit, absolute quasi-judicial immunity did *not* extend to the manner of the execution of a court order.

Finally, in the present case, the Seventh Circuit, after considering these decisions of the Eighth and Tenth Circuits, held that absolute quasi-judicial immunity did not apply to the Petitioner law enforcement officers who used excessive force in violation of the Fourth Amendment when they attempted to enforce a state judge's courtroom order restraining the plaintiffs. It found *Mireles* inapplicable because: the judge's contempt order was not challenged; the Petitioners' conduct was executive in nature and not judicial; the policy considerations underlying absolute immunity did not apply; and the possible availability of qualified immunity provided sufficient protection for Petitioners. Judge Bauer dissented, *Richman v. Sheahan*, 270 F.3d 430, 444 (7th Cir. 2001), essentially arguing that the Eighth Circuit was correct in *Hendren*.

Significantly, the Seventh Circuit is only the second circuit to rule explicitly on the issue raised. The Tenth Circuit's 1990 decision in *Martin*, whose reasoning supports Respondent's position, did not involve a judge's

courtroom order. And the Tenth Circuit's earlier 1989 decision in *Valdez*, which was thereafter distinguished in *Martin*, dealt with a judge's courtroom order that was itself the object of the section 1983 plaintiff's challenge. Thus, only the Seventh and Eighth Circuits, each 2-1, have dealt with the issues presented by this case, with admittedly conflicting results.

This conflict between only two circuits and among four (or six) judges is not sufficient to warrant a grant of certiorari. The issues of section 1983 interpretation, common law background and policy should be fleshed out by other circuits that will have the benefit of the very different reasoning of the Seventh and Eighth Circuits. After the other circuits decide whose reasoning is more persuasive, there will be time enough to grant certiorari to resolve any then-existing conflict.

II. THE SEVENTH CIRCUIT'S DECISION DOES NOT CONFLICT WITH *MIRELES V. WACO* BECAUSE THE CHALLENGED CONDUCT OF PETITIONERS IS NOT JUDICIAL IN NATURE.[5]

Petitioners strain mightily to create a conflict between the Seventh Circuit's decision and this Court's decision in *Mireles v. Waco*. But as the Seventh Circuit soundly noted (as did Judge Lay in his dissent in the Eighth Circuit's *Hendren* decision), *Mireles* is clearly inapposite. In *Mireles*, the plaintiff lawyer sued a judge for

---

[5] In Argument III, *infra*, Respondent contends that Petitioners' challenged conduct is clearly executive in nature.

allegedly ordering police officers to seize him with excessive force and to bring him before the judge in his courtroom. This Court held that the judge was protected by absolute immunity because (1) he acted within his jurisdiction and (2) his conduct ordering that a lawyer be brought to him in connection with a pending case was a judicial act.

In relying on *Mireles* for the proposition that using excessive force in connection with judicial proceedings is judicial in nature, Petitioners obscure the all-important fact – which the Seventh Circuit emphasized – that the challenged conduct in *Mireles* was the *judge's* alleged order to the police officers to use excessive force to bring the lawyer before him, and *not* the use of excessive force by the police officers themselves. Only the former was held by this Court to be protected by absolute immunity. In marked contrast to the situation in *Mireles*, Respondent did not sue Judge Jordan for requesting that the decedent be restrained, but rather sued the Petitioner deputy sheriffs who restrained the decedent with excessive force and thereby caused his death.

In effect, Petitioners argue that because Judge Jordan is (or would be) absolutely immune for ordering them to detain the decedent, they, too, should be absolutely immune. But this contention must fail. If Judge Jordan had himself stepped down from the bench and physically restrained decedent, then such conduct would not be judicial in nature because it is unrelated to the functions usually performed by judges and is contrary to the expectations of litigants. *See Stump v. Sparkman*, 435 U.S. 349, 362 (1978) ("[T]he facts determining whether an act by a judge is a 'judicial one' relate to the nature of the act

itself, i.e., whether it is a function normally performed by a judge, and to the expectations of the parties, i.e., whether they dealt with the judge in his judicial capacity."). *Cf. Gregory v. Thompson*, 500 F.2d 59, 63 (9th Cir. 1974) ("The decision to personally evict someone from a courtroom by the use of physical force is simply not an act of a judicial nature, and is not such as to require insulation in order that the decision be deliberately reached.")

Respondent certainly does not dispute the importance of the executive act of restraining persons in a courtroom in appropriate circumstances, particularly those involving contemptuous behavior. Rather, Respondent argues, and the Seventh Circuit agreed, that such conduct is not judicial in nature and hence not protected by absolute quasi-judicial immunity. As this Court reasoned in *Forrester v. White*, 484 U.S. at 229, where it rejected a judge's contention that he was entitled to absolute immunity for allegedly firing a probation officer because of her sex: it does not follow from the importance of administrative acts for a sound adjudicative system (like the supervision of court employees and overseeing the efficient operation of a court) that those acts are protected by absolute immunity.

Thus, the Seventh Circuit's decision does not conflict with this Court's decision in *Mireles*.

III. THE SEVENTH CIRCUIT CORRECTLY RULED THAT THE PETITIONER DEPUTY SHERIFFS ARE NOT PROTECTED BY ABSOLUTE QUASI-JUDICIAL IMMUNITY.

This Court should not grant certiorari because the Seventh Circuit got it right.

The Seventh Circuit first carefully distinguished between the question of "whether the challenged conduct was specifically ordered by the judge" and "the separate question of whether the conduct was lawful or exceeded the judge's order directly." It then observed that the Eighth Circuit in *Hendren* had failed to make this distinction, which accounted for that court's misplaced reliance on *Mireles*. Next, it emphasized that its quasi-judicial immunity cases were intended to protect judicial or quasi-judicial decision making, and that such decision making was not involved here because Respondent did not challenge any conduct of Petitioners that was specifically directed by the judge. For this reason, the policy considerations implicated in its quasi-judicial immunity cases had relatively little force in this case.

According to the Seventh Circuit, the policy considerations set out by the Eighth Circuit in *Hendren* were similarly insufficient to justify absolute immunity. Rather, qualified immunity – the standard ordinarily applied to law enforcement officers, *see Pierson v. Ray*, 386 U.S. 547 (1967) and *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) – more than adequately took account of the need for law enforcement officers such as Petitioners to balance the necessity of quick action in the courtroom on the one hand, and compliance with constitutional standards on the other.

While absolute immunity was surely vital for the protection of the judge's decision making, "[i]t is not necessary to the judicial function, in our judgment, to also deny a remedy to plaintiffs who were harmed not by the judge's order, but by unlawful conduct by those who enforce it." Thus, the Petitioners were not entitled to absolute quasi-judicial immunity.

The Seventh Circuit's decision is sound because: (1) the challenged conduct of Petitioners is executive in nature; (2) the common law immunity background does not support a quasi-judicial immunity rule for Petitioners; and (3) relevant policy considerations support only a qualified immunity rule in cases like this.

A. The Petitioners' Challenged Conduct is Executive in Nature.[6]

This Court has repeatedly declared that, for absolute and qualified immunity purposes, it is not a defendant's status that is determinative but rather the challenged conduct and its function. *See, e.g., Forrester v. White, supra,* which applied a functional approach and held that judges are not protected by absolute immunity for their administrative conduct in hiring and firing, and *Burns v. Reed, supra,* which applied a functional approach and held that prosecutors are not protected by absolute immunity for giving legal advice. In the present case, there can be little doubt that the challenged conduct is not judicial in nature

---

[6] In Argument II, *supra,* Respondent makes the related argument that the challenged conduct of Petitioners is not judicial in nature.

– *see* Argument II, *infra* – but rather executive. Restraining a citizen with force and arresting him or her are quintessentially executive functions for immunity purposes. *See Pierson v. Ray, supra,* dealing with warrantless arrests by law enforcement officers, and *Malley v. Briggs,* 475 U.S. 335 (1986), involving an arrest pursuant to warrant by law enforcement officers. *See also Graham v. Connor,* 490 U.S. 386 (1989), dealing with the use of excessive force in making an arrest. Such acts clearly are not judicial rulings. *Forrester v. White,* 792 F.2d 647, 658 (7th Cir. 1986) (Judge Posner dissenting, arguing that there was nothing in Supreme Court case law or policy to warrant the expansion of judicial immunity beyond judicial rulings), *rev'd,* 484 U.S. 219 (1988).

That Judge Jordan in his courtroom may have requested that the Petitioners take and detain the decedent does not convert Petitioners' executive law enforcement conduct into judicial conduct protected by absolute quasi-judicial immunity any more than a police officer's enforcement of a statute or ordinance converts that conduct into absolutely immune quasi-legislative conduct. As argued earlier, *Mireles v. Waco* clearly does not support Petitioners' position on this issue.

Thus, the challenged law enforcement conduct of Petitioners should receive qualified immunity protection at best because it is executive in nature.

B. The Common Law Immunity Background Does Not Support a Quasi-Judicial Immunity Rule.

In *Antoine v. Byers & Anderson,* 508 U.S. 429 (1993), this Court rejected the absolute quasi-judicial immunity

argument of a court reporter sued for failing to produce a transcript of a federal criminal trial. In so doing, and finding qualified immunity applicable instead, it articulated the appropriate approach where absolute immunity is claimed:

> The proponent of a claim to absolute immunity bears the burden of establishing the justification for such immunity. In determining which officials perform functions that might justify a full exemption from liability, "we have undertaken a 'considered inquiry into the immunity historically accorded the relevant official at common law and the interests behind it.' "

Antoine v. Byers & Anderson, 508 U.S. at 430 (quoting *Butz v. Economou*, 438 U.S. 478, 508 (1957)) (citations omitted). This Court in *Antoine* also observed that "[t]he presumption is that qualified immunity rather than absolute immunity is sufficient to protect government officials in the exercise of their duties, [and] we have been quite sparing in our recognition of absolute immunity, and have refused to extend it any further than its justification would warrant." 508 U.S. at 432 n.4 (quoting *Burns v. Reed*, 500 U.S. at 486-487).

An inquiry into the relevant common law tort immunity background through study of treatises by Cooley and Mechem[7] demonstrates that sheriffs and deputy sheriffs

---

[7] The treatises are T. Cooley, *Law of Torts* (1880) and F. Mechem, *The Law of Public Offices and Officers* (1890) (hereafter "Cooley" and "Mechem"). Both of these treatises are regularly resorted to by this Court in determining the relevant common law immunity background in the fourth quarter of the 19th century.

who used excessive force in making an arrest or otherwise restraining citizens were not protected from tort liability when section 1983 was enacted in 1871. These treatises also make clear that arresting or restraining someone was not considered a judicial act under the then-extant common law, even though doing so involved the exercise of judgment.

Thus, Cooley states that a defendant under arrest is entitled to be treated with ordinary humanity by a sheriff, and, for purposes of tort liability, any unnecessary severity cannot be justified by the arrest writ. Cooley, *supra* at 395. He also declares that a sheriff must not make any mistakes in connection with the execution of a writ. Cooley expressly rejects the argument that a ministerial mistake by a sheriff is a judicial act just because the sheriff must exercise judgment. In his view of the relevant tort law, the exercise of judgment cannot be the test between a judicial act and a ministerial act of the sort engaged in by sheriffs regarding executions of writs because the underlying factual question is referred by the law to the sheriff himself. *Id.* at 396. Cooley explains:

> It is difficult to name any subject in respect to which questions may not be raised; and if the existence of a question could be the test between [protected] judicial and [unprotected] ministerial action, there would be very little that would be classed as ministerial. Judicial action implies not merely a question, but a question referred for solution to the judgment or discretion of the officer himself.

Id. In the present case, Cooley's point applies analogously to the state law referral to the deputy sheriffs of the

decision of how much force to use in arresting the decedent. 55 ILCS 5/3-6015 (powers of deputies); 55 ILCS 5/3-6016 (sheriff liable for acts of deputies); 55 ILCS 5/3-6021 (sheriffs responsible to keep the peace). It was *they* who decided how to restrain the decedent, not Judge Jordan.

Mechem is even more supportive of plaintiff's position. Thus, his list of quasi-judicial officers and functions in section 639 of his treatise does not include anything resembling the making of an arrest. Mechem, *supra* at 421-24. Also, while characterizing service of process by sheriffs, marshals, coroners and constables as ministerial, *id.* at 485, he points out, as Cooley does, that a quasi-judicial official who acts ministerially can be liable in tort because an act can be ministerial even if it involves skill, judgment and discretion. *Id.* at 429. He further declares that a sheriff can be liable for abuse of process in making an arrest, *id.* at 514, and for the arrest of the wrong person, even though the sheriff's mistake was reasonable. *Id.* at 518.

Consequently, the relevant common law immunity background for sheriffs and their deputies and the common law's characterization of a sheriff's abuse of process in making an arrest do not support the grant of absolute quasi-judicial immunity to the Petitioners in this case.

C. Relevant Policy Considerations Support Only a Qualified Immunity Rule in Cases Like This.

In light of this Court's strong presumption against absolute quasi-judicial immunity and the common law background of no absolute immunity for the challenged

conduct in this case, Respondent need go no further in support of the Seventh Circuit's decision. She knows of no section 1983 immunity decision of this Court in which strong policy considerations trumped a common law background of no absolute individual immunity.[8] Nevertheless, Respondent feels constrained to respond to various policy considerations set out in *Hendren, supra,* and *Valdez v. City of Denver, supra,* on which Petitioners (and Judge Bauer in his dissent in this case) so extensively rely.

The *Hendren* court's observation that absolute quasi-judicial immunity is necessary to protect law enforcement officers in courtrooms from "dangerous, even fatal, hesitation," and the *Valdez* court's suggestion that losing parties would threaten officers with "harassing litigation" are not persuasive. Those purposes, together with the admittedly important interest in fairness to government officials, are more than adequately served by qualified immunity which protects officers who act with objective reasonableness in light of clearly settled law from damages liability. *Harlow v. Fitzgerald, supra.* Moreover, qualified immunity has been transformed by this Court from *liability* immunity into *suit* immunity to such an extent that discovery is typically postponed until the qualified immunity issue is resolved, *Harlow v. Fitzgerald, supra,* as the district court has in fact done in the present case. These doctrinal developments in qualified immunity law

---

[8] To the contrary: strong policy considerations can trump a common law background of absolute immunity, as this Court held in *Scheuer v. Rhodes,* 416 U.S. 232 (1974) (governors are protected by qualified immunity from section 1983 damages liability despite absolute immunity at common law).

provide more than enough protection to the Petitioners here and those similarly situated when they exceed a court's prescribed order and act unconstitutionally.

Furthermore, this Court rejected a similar "harassing litigation" argument for absolute quasi-judicial immunity for court reporters in *Antoine v. Byers & Anderson, supra*. It responded, first, that cases involving court reporters were comparatively rare. This is the case here as well because "[Petitioners] have not provided us with empirical evidence demonstrating the existence of any significant volume of vexatious and burdensome actions against [deputy sheriffs accused of using excessive force in courtrooms]. . . . " *Antoine v. Byers & Anderson*, 508 U.S. at 437. This Court's second response was that if a large number of cases did materialize, then Congress could act. Similarly, Congress can amend section 1983 if it wishes to protect deputy sheriffs in the circumstances of our case.[9] Hence, in light of the adequate protection offered the defendants by qualified immunity and the strong compensation function of section 1983, *Carey v. Piphus*, 435 U.S. 247 (1978), absolute quasi-judicial immunity is not warranted in this case.

For all of these reasons – the crucial distinction between an executive act and a judicial one, the relevant case law of this Court, the 1871 common law background

---

[9] For example, confronted with what it considered to be an unduly large number of vexatious suits against prison officials, Congress enacted the Prison Litigation Reform Act, Pub. L. No. 104-134, 1996 HR 3019.

of no absolute immunity and relevant policy considerations – the Seventh Circuit correctly ruled that the Petitioner deputy sheriffs were not entitled to quasi-judicial immunity.

CONCLUSION

Because the narrow issue raised by this Seventh Circuit case has only been ruled on by one other circuit, the Eighth, it would be premature to grant the Petition. The circuits should study the issue more thoroughly before this Court expends its limited resources by intervening at this time. Furthermore, contrary to Petitioners' argument, there is clearly no conflict between the Seventh Circuit's decision and this Court's decision in *Mireles v. Waco*, which deals with the immunity of judges for their judicial acts. Finally, the Seventh Circuit decided this case correctly. Thus, Respondent respectfully requests that this Court deny the Petition.

Respectfully submitted,

ALVIN W. BLOCK
EDWARD A. COHEN
JEROME E. BOYLE*
**Counsel of Record*
BLOCK & ASSOCIATES
33 N. LaSalle Street, Suite 3000
Chicago, Illinois 60602
(312) 346-5656
Counsel for Respondent

Of Counsel
SHELDON H. NAHMOD
565 W. Adams Street
Chicago, Illinois 60661
(312) 906-5261